IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 539 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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RAJENDRAKUMAR RAMANLAL - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
THROUGH JAIL for Appellant(s) : 1,MRS SHILPA R SHAH for Appellant(s) : 1,
MR RC KODEKAR, Additional Public Prosecutor for

Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 25/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The present appeal is filed by the appellant-original accused through jail who was convicted under Section-8(c) read with Section-21 of the Narcotic Drugs & Psychotropic Substance Act, 1985 (hereinafter referred to as “the Act”) and ordered to suffer rigorous imprisonment for a period of 10 years and fine of Rs. 1 Lacs and in default thereof, to undergo further R.I of two years.

2. Brief facts giving rise to the present appeal are as under :-

3. It is the case of the prosecution that when the Police Inspector – Mr.V.N.Chauhan was in his office he received an information from the informant that one person is dealing in selling of 'charas' and at the time of giving such information, the said person was dealing with the said business. Mr.Chauhan has taken down said information and he had informed his superior officer immediately. It is also the case of the prosecution that two panch witnesses were called and they were made to understand about raid and after completion of preliminary panchnama the police party had gone for raid. It is also the case of the prosecution that the accused was found near a shop of Ganesh Corporation, Near Mahakali Mandir, Naroda road, Ahmedabad. The appellant was detained and after giving him an understanding of taking inspection in the presence of the Magistrate the search was taken. During his search 55 gram of charas

was found from him. The raiding party has collected muddamal articles and panchnamas were drawn at the place of offence. Seizure memo and arrest memo were issued and the appellant accused was arrested. Mr.Chauhan has lodged the complaint and the muddamal articles were sent to Police Station for custody. Based on the said complaint, offence was registered and immediately articles were sent for analysis to Forensic Science Laboratory, Ahmedabad and on receipt of the F.S.L. Report, the investigation was carried out.

4. Pursuant to the registration of the offence, the investigation was put into motion. During the course of investigation, statements of the witnesses were recorded. Based on the F.S.L. Report, since sufficient incriminating evidence was found against the accused, he was charge-sheeted in the Court of learned Additional Sessions Judge,

Ahmedabad. The learned Additional Sessions Judge, Ahmedabad framed charge against the accused for commission of the offence punishable under Section 8(c) read with Section 21 of the Act.

5. The charge was read over and explained to the accused as the accused has not pleaded guilty to the said charge. He was put to trial and tried by the learned Additional Sessions Judge, Ahmedabad in Sessions Case No.175 of 1999.

6. To prove the culpability of the accused, prosecution has in all examined as many as 7 witnesses. Prosecution has also produced several documents and relied upon the contents of the same. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge, Ahmedabad explained the accused the circumstances appearing against them in the

evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated.

7. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned Additional Sessions Judge, Ahmedabad has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused was proved and, therefore, the accused was held guilty of the offence punishable under Section 8(c) read with Section 21 of the Act. The learned Additional Sessions Judge, Ahmedabad has, however, heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking

to the circumstances, original accused was sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, to undergo R.I. of two years.

8. Ms. Shilpa R. Shah, learned advocate appearing for the appellants – original accused has taken us through the oral as well as documentary evidence which are on record and also assailed the judgment and order of the learned Additional Sessions Judge, Ahmedabad dated 28.3.2000. She has submitted that the learned Additional Sessions Judge has erred in convicting the appellant though there was no cogent or adequate evidence showing his guilt in the matter. She has further submitted that the learned Additional Sessions Judge, Ahmedabad has failed to appreciate that the appellant is innocent and has not committed the alleged offence. The information was not reduced to writing and provisions contained in Section 42 of the Act

were not complied with. She has further submitted that the panchas were not asked any question about compliance of Section 50 of the Act. She has further submitted that there is discrepancy with regard to the weight in the sample sent by the police authority as well as the said sample received by the Forensic Science Laboratory. As per the say of the Police Inspector, 10 gram of muddamal article i.e charas was sent to Forensic Science Laboratory whereas the Forensic Science Laboratory has received the said muddamal article, weight of which was found 9.750 gram. This discrepancy in weight clearly indicates that it was not the said muddamal which was sent by the Police Inspector to the Forensic Science Laboratory. She has further submitted that the panch witness has not supported the case of the prosecution and one another panch has been dropped intentionally and though the independent witnesses were available they

have not been examined. The persons who were having first hand knowledge about the raid have not been examined and no satisfactory reason has come on record. She has further submitted that Section-57 of the Act states whenever any person makes any arrest or seizure, under this Act, he shall, within forty-eight hours next after such arrest or seizure, make a full report of all the particulars of such arrest or seizure to his immediate official superior. It has come on record that it was not received within 48 hours. She has further submitted that it was the case of the prosecution that the muddamal articles were found from the pocket of the pent worn by the accused. However, the said pent has not been seized by the police. Looking to all these lacunas in the investigation and considering the settled legal position, the accused should have been acquitted by the learned Additional Sessions Judge, as there was no cogent and concrete

proof against the accused and the accused was falsely implicated in the alleged offence.

9. Mr.R.C.Kodekar, learned Additional Public Prosecutor, on the other hand has supported the order and judgment of the learned Additional Sessions Judge, Ahmedabad and submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties and/or investigating agency and there was no substance in the argument that the provisions contained in Section 42 as well as 50 of the Act were violated. In support of his contention, he relied on the decision of the Hon'ble Supreme Court in the case of **Babubhai Odhavji Patel and Others V/s. State of Gujarat, 2005 (8) SCC 725,** wherein it is held that Section 42 provides that a specific information alone need be recorded by the officer empowered to conduct a search. It

has come on the evidence of the witnesses that the specific information has been recorded and it was also communicated to the higher officer. He has, therefore, submitted that there is no violation of provision contained in Section-42 of the Act. Mr.Kodekar has further relied on the decision of the Hon'ble Supreme Court **in the case of G Srinivas Goud vs. State of A.P, reported in (2005)8 Supreme Court Cases 183** wherein while dealing with the argument that the officer conducting the raid did not send copy of the information received by him which led to the search and seizure, to his immediate superior official as required under Sections-42(2) of the Act and that due to non-compliance with this provision, the case of the prosecution must fail. After discussing the case law on the subject it was held that there is no violation of this statutory provision. In this very judgment the Hon'ble Supreme Court has also dealt with the issue regarding non-

examination of independent witnesses and held that the said plea is raised only with a view to throw doubt upon the recovery of the contraband drug. From the police witnesses it was clearly found that there was no discrepancy in weighing of the contraband material. With regard to minor discrepancy in the sample Mr.Kodekar has submitted that such a discrepancy is very negligible and it would not affect the prosecution case about the recovery and seizure of the contraband articles. He has, therefore, submitted that the learned Additional Sessions Judge, Ahmedabad has discussed at length all the issues which are raised by the appellant-accused in the present appeal and after considering the same the learned Additional Sessions Judge, Ahmedabad has come to the right conclusion that there was no violation of any of the provisions of the Act. He has, therefore, submitted that the impugned order and judgment does not call for any

interference by this Court while exercising its appellate jurisdiction.

10.We have considered the submissions advanced by Ms.Shilpa Shah, learned advocate appearing for the appellant-original accused and Mr.R.C.Kodekar, learned Additional Public Prosecutor, appearing for the State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Additional Sessions Judge, Ahmedabad convicting the accused and sentencing him for the R.I of 10 years and fine of Rs.1 lac and in default thereof, to undergo further R.I of

2 years.

11. In order to find out whether the prosecution has established the charge against the accused beyond reasonable doubt and whether the learned Additional Sessions Judge, has recorded a just and correct conclusion holding the accused guilty, we may first advert to the oral testimony of the prosecution witness No.1.

12. Mr.V.L.Chauhan – P.W No.1 in his deposition Ex.9 has stated that he has received the information to the effect that one person was dealing in charas and his name is Rajendra Modi. He has made an entry in the register on page-1952 at about 2:40 p.m in his own hand writing and he has also duly signed the said entry. He has further deposed that he has sent Police Constable – Natubhai Makwana to give this information to his superior

police officer i.e. Police Superintendent. He has further stated that in the presence of panchas, the accused-appellant was examined and contraband article was found and after preparation of preliminary panchnama the same was recovered and proper procedure with regard to seal of the muddamal article was followed. The prosecution has also examined Vakhtsinh J. Solanki P.W No.2 and in his deposition Ex.20 he has also reiterated the same story as was unfolded from the deposition of Mr.Chauhan. He has stated that 55 gram of charas was found from the possession of the appellant-accused and from this muddamal article two samples of 10 grams each were taken out and the same were put into the plastic bag which were sealed after getting necessary heat to it and thereafter the same were stitched by cotton thread and slip duly signed by panchas as well as Investigating Officer was put and thereafter it was sealed. The prosecution has also

examined Baluji U. Chauhan – P.W. No.3 Ex.21 and Ahmed Zakariya Saiyed P.W No.4 Ex.24. They have also supported the case of the prosecution. Chemical analysis of the muddamal article was made by Forensic Science Laboratory and as per the report dated 4.6.1999 it was found that the muddamal article seized was charas within the meaning of NDPS Act.

13. On the evidence of aforesaid witnesses as well as material produced by the prosecution it was clearly established that the appellant-accused has committed offence under Section-8(c) read with Section-21 of the Act. The learned Additional Sessions Judge, Ahmedabad has discussed the entire evidence threadbare and come to the right conclusion. It is well settled that merely because the panch witnesses do not support the case of the prosecution, the case of the prosecution

need not be thrown over-board as unreliable. It may be realised that the phenomenon of panch witnesses turning hostile to the persecution is not unknown and is ever on the increase. It needs hardly to be emphasised that the decision of a case does not depend solely on the question whether the panch witnesses support the prosecution or turn their back on it. If the decision of the case were to depend solely on the testimony of panch witnesses regardless of the evidence of police officers, in theory, it would be giving a right to veto to the panchas so far as that question of culpability of an accused is concerned, which is not permissible in criminal jurisprudence. It is well settled that without good ground being pointed out, testimony of police officer, if otherwise found to be true and dependable, cannot be discarded by Court on the ground that he is a police officer.

14.On the facts and in the circumstances of the case, this Court finds that testimony of P.W Nos.1 to 3 are not only inspiring confidence, but get corroboration from the other evidence on record. The Court is also conscious about the fact that to combat illicit drug traffic and drug abuse, both at the national and international levels, the penal provisions contained under the NDPS Act are stringent and punishment thereunder is harsh, therefore, as per the settled principles of criminal jurisprudence, the Court of law must insist on the strict compliance of the safeguards provided under the statutory provisions contained thereunder. In this connection, it would be appropriate to refer to the observations made by the Supreme Court in the case of **Bharatbhai Bhagwanjibhai v. State of Gujarat, AIR 2003 SC 7**. In para 1 of the

said judgment, the Supreme Court has observed as under:

> “The Statement of Objects and Reasons of the NDPS Act categorically records the inadequacy of the existing legislation to combat illicit drug traffic and drug abuse, both at the national and international levels and it is by reason of such deficiencies in the existing laws, the legislature thought it prudent to consolidate the same and bring about a comprehensive legislation so as to meet the exigencies of the situation. A plain look at the provisions of the NDPS Act read with the Statement of Objects and the Preamble would depict the intent of legislature as regards the offences under the said consolidated legislation, which stands expressed in rather explicit language as one of the most heinous ones in nature. This Court, however, in consonance with criminal jurisprudence of the country has been insisting on strict compliance of the safeguards provided under the statute so as to be in tune therewith".

15. In view of the stringent penal provisions and harsh punishment provided thereunder and in view of the observations made by the Supreme Court in the above referred to judgment, we have strictly construed the

provisions contained in the Act, as they stood at the relevant point of time. The incident has taken place on 1.5.1999. The investigation was made and trial was completed and the impugned judgment and order was passed on 28.3.2000. During this period the old provisions were in force. Section-21 of the Old Act reads as under :-

> “Section-21 Punishment for contravention in relation to manufactured drugs and preparations:- Whoever, in contravention of any provision of this Act, or any rule or order made or condition of licence granted thereunder manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:
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> Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

16. An amendment was made in the Act by Narcotic Drugs and Psychotropic Substances

(Amendment) Act, 2001 and as per the amended provisions, Section-21 reads as under :-

> “Section-21 Punishment for contravention in relation to manufactured drugs and preparations:- Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any manufactured drug or any preparation containing any manufactured drug shall be punishable,-
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> (a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both;
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> (b) where the contravention involves quantity, lesser, than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;
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> (c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees;
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> Provided that court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.”

17. Admittedly, the contraband articles found

from the possession of the appellant-accused were of 55 gram. Entry-23 deals with charas and small quantity is 100 gram whereas commercial quantity is 1 kg. If it is the small quantity then the offence is punishable with R.I for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

18. Section-41 of the Amendment Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of this Amendment Act reads as under:-

> "Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the

commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal."

19. Section-41(1) has come up for consideration before the Hon'ble Supreme Court **in the case of Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609**. It is observed by the Hon'ble Supreme Court that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the 1985 Act as amended by the Act of 2001. In other words, the benefit of the rationalised sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing

structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to

the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

20. From the aforesaid statutory provisions as well as the observations made by the Hon'ble Supreme Court, it is clear that if the trial is not completed or the investigation is not over prior to 2.10.2001 the benefit of the amended provisions are available to the accused. However, in the present case the trial was completed in March, 2000 and appeal filed against the impugned judgment is pending before this Court. By virtue of the proviso specifically carved out, the benefit of the said amendment

is not available to the appellant-accused despite the fact that the quantity found was small quantity being 55 gram of charas. It is very unfortunate that the trial was completed only a year and seven months earlier, which is the cut off date provided under the Act. It is only because of that six months imprisonment was turned into 10 years R.I as stated earlier. We are, however, bound by the statutory provisions of law as interpreted by the Hon'ble Supreme Court on this point.

21. On close scrutiny of the evidence on record, we find no infirmity in the findings, ultimate conclusion and the resultant order of conviction and sentence recorded by the learned Additional Sessions Judge. We are in complete agreement with the said findings, ultimate conclusion and resultant order of conviction and sentence as according to us,

no other conclusion is possible except the one reached by the learned Additional Sessions Judge on the facts and in the circumstances of the case.

22. No new argument is advanced. No new criticism is offered. No infirmity in the reasoning of the learned Additional Sessions Judge is pointed out. The evidence has been carefully analyzed and fully appreciated in the closely reasoned judgment with which we concur. We do not think it right to give further reasons then what has been given by the learned Additional Sessions Judge in the impugned judgment and order.

23. In the above view of the matter, we are not inclined to interfere in the order and judgment of the learned Additional Sessions Judge, Ahmedabad, except with the direction given by the learned Additional Sessions

Judge, Ahmedabad, to undergo R.I of 2 years in case of default of payment of fine of Rs.1 lac. If the appellant-accused has not paid the fine of Rs.1 lacs in that case the appellant-accused is directed to undergo R.I of three months instead of 2 years. The Court reduces this alternative sentence which is well within its discretion only because the appellant-accused is deprived of the benefit of amended provisions for no fault on his part.

24. Subject to the aforesaid directions and/or modification in the alternative sentence in lieu of non-payment of fine present appeal is accordingly dismissed.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

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